

1. **1614350 (Migration) [2017] AATA 2637 (20 November 2017)**

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DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1614350

MEMBER: Moira Brophy

DATE: 20 November 2017

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 20 November 2017 at 3:45pm

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 – Breached previous visa conditions – Previous Domestic Violence order issued to the sponsor – Sponsor unwell – Claims applicant has been involved in illegal activities – Inconsistent evidence – False and misleading documentation – Did not satisfy the Public Interest criteria

LEGISLATION

Migration Act 1958 ss 5(1), 65, 376, 359AA

Migration Regulations 1994 r 1.03 Schedule 2 cls 820.226 Schedule 4 Criteria 4020(1), 4020(2), 4020(2AA), 4020(2A), 4020(2B), 4020 (2BA), 4020(3), 4020(4), 4020(5)

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Plaintiff M64/2015 v MIBP [2015] HCA 50

Trivedi v MIBP [2014] FCAFC 42

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

6. This is an application for review of a decision made by a delegate of the Minister for Immigration on 1 September 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
7. The applicant applied for the visa on 10 September 2014. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.820.226 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate was not satisfied the applicant could satisfy Public Interest Criteria 4020 (PIC 4020).
8. The applicant, [Ms A] appeared before the Tribunal on 13 October 2017 and 9 November 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor [Mr B]. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
9. The applicant was represented in relation to the review by her registered migration agent.
10. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

BACKGROUND

11. [Ms A] was born in China in [date]. She is currently [age] years old. [Ms A] has declared one previous marriage in 1999 that ended in divorce in 2006. There was one child of the marriage, a boy born in [date]. He currently resides in [another country]. Her parents and [siblings] reside in China.
12. [Ms A] first arrived in Australia on a Tourist visa (subclass 676). This visa was cancelled on 18 January 2007 for breach of the Visa conditions and mission getting departed Australia on 24 January 2007. As a result of the breach of visa condition she was subject to a three-year exclusion period. [Ms A] next arrived in Australia on 14 June 2013 on an electronic travel authority (visitor) visa (subclass 601) which ceased on 14 September 2013. On 24 June 2013 [Ms A] lodged an application for a non-award sector (student) visa (subclass 575). This application was refused on 16 September 2013. [Ms A] sought review of that decision with the Migration Review Tribunal, but withdrew her application on 2 September 2014. On 10 September 2014 [Ms A] lodged an application for a Partner visa.
13. [Mr B] was born in China in [date] and migrated to Australia in 1988. He is an Australian citizen. [Mr B] was previously married in the period from July 2003 to September 2005. He has one son born in [date]. His parents and [siblings] reside in China.
14. The parties stated that they met [in Sydney] on 18 July 2013 and committed to a relationship in December 2013 when they commenced a de facto relationship. They decided to get married in February 2014. They were married in Sydney [in] May 2014.
15. On 2 June 2016 the Department wrote to [Ms A] to invite her to comment on adverse information, in particular that she had provided false and misleading information in that she had failed to disclose her previous criminal conviction. Accordingly it was held she failed to satisfy PIC 4020. [Ms A] responded on 21 June 2017. She set out what she considered were compelling circumstances for the waiver of the requirements.

16. In the Record of Decision, a copy of which [Ms A] provided to the Tribunal, the delegate acknowledged receipt of [Ms A]'s submissions. The delegate said that [Ms A] had not identified any compelling circumstances that affect the interests of Australia or compassionate or compelling circumstances that affect the interest of an Australian citizen, Australian permanent resident or eligible New Zealand citizen. The delegate was therefore not satisfied that [Ms A] met PIC 4020(1).
17. Prior to hearing [Ms A] provided documents to the Tribunal in support of the application including but not limited to the following: relationship statement by the applicant and a submission prepared by the agent.
18. At the time of hearing the Tribunal was provided with the following documents;
 - A copy of an Interim Order Apprehended Domestic Violence Order dated [September] 2007 and issued to [Mr B], it was noted the order was made to protect [Ms A];
 - Final Order Apprehended Domestic Violence Order dated [July] 2014 and issued to [Mr B], it was noted the order was made to protect [Ms A] and was to be in force for a period of twelve months;
 - A New South Wales Certificate of Title issued under the Real Property Act 1900 for Lot [number] in Strata Plan [number] at [Sydney] dated [July] 2015 showing in the first schedule [Mr B] and [Ms A] as tenants in common in equal shares.
 - A New South Wales Certificate of Title issued under the Real Property Act 1900 for Lot [number] in Strata Plan [number] at [Sydney] dated [July] 2017 showing in the first schedule [Ms A].
19. Prior to taking evidence the Tribunal raised with the applicant whether the sponsor being in attendance would be a potential breach of the Interim Order Apprehended Domestic Violence Order dated [September] 2007 and issued to [Mr B] (the sponsor). The applicant told the Tribunal that the Interim Order had been withdrawn and the Tribunal proceeded to hear evidence from both parties who were at times in the same room on that basis.

TRIBUNAL PROCEEDINGS

20. *Hearing on 13 October 2017*

21. *Evidence of visa applicant*

22. [Ms A] told the Tribunal that the relationship was in difficulties at the moment. She did not expect the sponsor to attend the hearing and was unsure as to whether or not he was in fact going to withdraw his sponsorship. (the sponsor arrived late at the Tribunal) She said things were very uncertain for her at the moment as they were having a lot of arguments about property and business matters.
23. The Tribunal asked the applicant about the domestic violence order that had been granted in July 2014. The Tribunal put it to the applicant that that evidence may be considered to be persuasive evidence that there was not a genuine and continuing relationship at the time the application was made in September 2014. The applicant told the Tribunal that the current APO application had recently been withdrawn and there were no AVOs in place at the time of hearing.

24. The applicant said that she had been to Australia on two previous occasions. She had worked in Sydney in 2006 as [an Occupation 1]. She had been introduced to that industry by a friend and had not initially wanted to work in that industry. She said that she had come to Australia on another occasion for only two days but she was unable to remember when that was.
25. The applicant said that she had come here in 2013 to study, travel and to learn English. She said that she had worked as [an Occupation 1] for a short time (about four to five months) while she was waiting for her appeal against her visa cancellation to be heard. She said during this period she had met her now husband and had left that work to go and work in [a shop]. She commenced work at the shop that that she and her husband still operate in [Sydney]. She said the shop [details deleted].
26. The applicant told the Tribunal that she was currently living with her husband at She said she had been living at that property since Christmas 2014. The property was originally owned by her husband but he has since transferred the title into her name. She said he had purchased the property about two years before she met him. When asked why he had transferred the title to her she said it was to show his love and to give her a sense of security. When asked about the mortgage on the property she said that the property was in fact owned outright. She said there had previously been a mortgage when she had borrowed money from some friends because they needed to buy some goods and her mother was sick but they have since paid off that loan and the Certificate of Title has been updated to reflect this.
27. The applicant said that her family lived overseas in China and she was the only member of her family in Australia. She is in contact with her family by telephone every Sunday. She said her son lives in [another country] with her ex-husband and he is presently studying. She said that she has contact with her son each fortnight and she has not seen him for three years.
28. The applicant said that her sponsor also does not have family here, his family is overseas in China and she has not met them. He has a [son] who is living in Beijing and she has not met him.
29. When asked about her health the applicant said she was in good health. She said the sponsor was not in good health. He has a rapid heartbeat which is a genetic condition. She said he also suffered from depression which was as a result of his being abandoned at a young age by his mother. She said he was damaged by growing up in a single-parent family. She said he has a [sibling] who was married with [children] but he has little contact with [this sibling].
30. When asked what she considered to be the compelling circumstances why there should be a waiver of the PIC 4020 criteria in her case she said it was mainly because of the health of the sponsor and the fact that he needed her to look after him and he needed to be loved to make up for what he had lost from his mother. When asked by the Tribunal why she would want to remain to care for the person who she said was abusing her she said that was because she loved him and he had been violent even before they were married. She said he does love her very much but he has depression and emotional issues. When asked what medication he was taking she said that he was medicated for headaches and insomnia but he was not really taking the sleeping tablets much since he had been with her. She said that he was medicated for his heart condition but she was unsure of the name of that medication. When asked if he saw a counsellor she said he doesn't really want to go to a counsellor. She said during bouts of depression he isolates himself away from everybody.

31.

32. *Evidence of sponsor.*

33. The sponsor told the Tribunal that he had gifted his share of the property they lived into his wife as he wanted to demonstrate to her his love. He said that was what they did in Chinese culture.
34. When asked about his health the sponsor said he had a long history of headaches and backaches. When asked what treatment he was currently receiving he said he did not like to go to doctors. He said he takes a strong painkiller that he can only obtain on prescription but he was unsure of the name of that medication. He said he was not having physiotherapy but he used to have massage and they used electrical stimulation on his back to alleviate the pain. He said it was very difficult for him to get to medical appointments as he had to work at night. He said he also gets cramps in his legs at night and they will make him scream with pain. He said he does not get them all the time but they are bad when he does get them. He said he had had problems with his heart and had to call the ambulance as he said he had gone all cold and sweaty. He repeated that it was difficult to attend medical appointments as he was under pressure to work.
35. The sponsor said that he works at the shop in [Sydney] [details deleted]. Their clientele were [details deleted]. He said the rent in [Sydney] was very expensive and said they had converted the back of the shop into a trading area to make better use of the space.
36. The sponsor said he needed to have his family with him and he did not want them to be apart at all.

37. *Hearing on 9 November 2017*

38. **INVITATION TO COMMENT ON OR RESPOND TO INFORMATION**

39. The Tribunal put [Ms A] on notice that there was material protected by section 376 of the Migration Act contained within the Departmental file. That information related to her previous immigration history and to her having had a previous visa cancelled because of a breach of conditions. The information referred to her having been located working in a [workplace] in Perth in January 2007. The information also referred to [Ms A] previously being known as [Ms C] DOB [date]
40. [Ms A] told the Tribunal that she had only ever worked as [an Occupation 1] for two days in Sydney. In Perth she visited her friend working in the [workplace]. She had been prepared to work but did not actually work. When she had discovered [that workers in her industry] were unprotected in that they did not have an employer and were not governed by rules she had stopped working.
41. [Ms A] told the Tribunal she had previously been known as [Ms C]. When she had reached the age of [age] years there had been a conflict between her year and her fate. That was the reason she had changed her name. It was to avoid conflict. After one year she had changed her name back.
42. At the hearing the Tribunal advised the applicant that information received by the Department and included in the Department file indicated that [in] 2017 a community member advised the Department that [Ms A] arranged fake marriages and that she had previously 'conned' money from the informant to pay for narcotics and other illegal activities. The informant provided details of two places [Ms A] was said to work. The Tribunal disclosed to [Ms A] it had googled the two addresses and they were [listed]. The informant further stated [Ms A] was a supplier of narcotics.

43. It was put to [Ms A] that the material was protected by a section 376 of the Migration Act but the Tribunal used its discretion to disclose the material as it considered the information to be relevant because the Tribunal may conclude that the information provided to the Department was reliable. It was put to [Ms A] the Tribunal may conclude that the evidence that she gave at the hearing regarding her circumstances was not truthful and could not be accepted at face value. It was further put to her the Tribunal may also conclude that she was willing to conceal information as to her circumstances to obtain a migration outcome, both at the time of application and during any subsequent administrative review. This in turn would be the reason, or a part of the reason, for affirming the decision that is under review.
44. In response [Ms A] told the Tribunal that she denied the allegation she was in the business of arranging fake marriages for the purposes of obtaining a visa. She also denied the allegation she 'conned' 'money to pay for narcotics or that she supplied narcotics.
45. As to whether she had worked at the two addresses provided [Ms A] said she had worked there in the past but she no longer works there. She said the person running the agency is a friend of hers and she sometimes contacts her if she is short of [staff] for a shift. [Ms A] said she only provides short term assistance. When asked when she had last worked there [Ms A] said it was two weeks ago. It was put to [Ms A] under section 359AA that evidence was inconsistent with her earlier evidence and she agreed that it was. She said she did not want the sponsor to know of her work.
46. [Ms A] asked the Tribunal to take into account the sponsor's health and the fact he required assistance but was reluctant to get it. [Ms A] said while [that line of work] was fun when you were young and working with friends she was now in her [age] and she just wanted to be able to care for her husband. She was most concerned for him if she was not allowed to stay and considered it would be cruel if she was removed from Australia when she had been fortunate enough to find love in her [age].

EVIDENCE RECEIVED AFTER HEARING

47. On 10 November 2017 the Tribunal received by hand a statutory declaration from [Mr D] dated 10 November 2017. The statutory declaration had four annexures. In summary the statutory declaration was to the effect the author had previously made allegations against the visa applicant and he wished to withdraw those allegations.
48. On 12 November 2017 an email sent at 5.24 am was received purporting to be from [Mr D] alleging he was coerced into writing the statutory declaration.
49. On 12 November 2017 an email sent at 4.02 pm was received purporting to be from [Mr D] seeking to withdraw his previous accusations. He also sought to withdraw information previously provided to the department in March 2017.
50. On 13 November 2017 an email sent at 5.21 am was received purporting to from [Mr D] alleging he had been threatened and forced to leave NSW.
51. On 13 November 2017 an email sent at 3.10 pm was received purporting to be from [Mr D] and claiming his email account had been hacked and used to send messages. He stated he was not in danger and requested his previous email be ignored.
52. On 13 November 2017 the applicant wrote to the Tribunal expressing her horror at the claims made against her that she had learned of at the Tribunal hearing. She advised she had made contact with the person who had made the allegations against her and those claims were to now be withdrawn. She stressed the need to allow her to stay in Australia and care for her sick husband.

CONSIDERATION OF CLAIMS AND EVIDENCE

53. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.820.226 for the grant of the visa. Broadly speaking, this requires that:
- there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: cl.4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy cl.4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: cl.4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2B) and (2BA).
54. The requirements in cl.4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: cl.4020(4). However, this waiver does not apply to the identity requirements in cl.4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

HAS THE APPLICANT GIVEN, OR CAUSED TO BE GIVEN A BOGUS DOCUMENT, OR INFORMATION THAT IS FALSE OR MISLEADING IN MATERIAL PARTICULAR?

55. The term 'information that is false or misleading in a material particular' is defined in cl.4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in cl.4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
56. The requirement in cl.4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: cl.4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
57. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

58. There is evidence before the Tribunal indicating that [Ms A] has given 'information that is false or misleading in a material particular' as defined in cl.4020(5). At the time of hearing [Ms A] did not deny that to be the case. Her evidence was she was not aware the fine she received in [another country] in 2000 for being in breach of her visa conditions was recorded and was a criminal offence. She had breached her visa conditions at the time because she was in the advanced stages of pregnancy and she considered it safer to have her baby in [another country] rather than going back to mainland China.
59. The Tribunal did not regard her explanation as a persuasive reason for the fact information that is false or misleading in a material particular was provided by her.
60. Therefore, [Ms A] does not meet cl.4020(1).

SHOULD THE REQUIREMENTS OF CL.4020(1) OR (2) BE WAIVED?

61. The requirements of cl.4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa.
62. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
63. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.
64. The requirements of cl.4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa.
65. The Explanatory Statement states that it is intended that the granting of the waiver relates solely to compelling circumstances affecting Australia's interests, or the compassionate or compelling circumstances affecting the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, not the interests of the visa applicant. The types of circumstances that may involve compelling or compassionate reasons for waiving the requirements of PIC 4020 include:
 - family reasons (for example, unexpected serious or fatal family situations over which the applicant had no control, such as the incapacitation or death of a partner or child or another member of the family unit);
 - that family members in Australia would be left without financial or emotional support; and
 - a parent in Australia would be separated from their child (for example, if the child was removed with their non-resident parent and would therefore be subject to an exclusion period).

66. The Tribunal is required to consider all the circumstances of the case including any matters put forward by an applicant, and determine on the evidence as a whole whether there are compelling and/or compassionate circumstances justifying the granting of the visa.
67. [Ms A] has not made any submissions or claims that there are compelling circumstances that affect the interests of Australia in this matter. Her submission to the Department and to the Tribunal relate to compelling or compassionate circumstances that affect [Mr B], who is an Australian citizen.
68. *Compassionate or compelling circumstances that affect the interest of an Australian citizen*
69. The Tribunal acknowledges the parties have been in a relationship for four years and that they have lived and worked together during that period. While the Tribunal accepts the relationship may have had its ups and downs the parties nonetheless provide each other with support as was evidenced by their both being at the hearing. The Tribunal accepts that the parties would find any separation very distressing, were [Ms A] to leave Australia. However these circumstances are the hallmarks of a genuine partner relationship which form the basis of all partner visa applications. In the Tribunal's view an application for a Partner visa is predicated on a close relationship between the parties and having considered all the circumstances, in this case, the tribunal does not find the relationship of itself is a compelling reason to waive the requirements.
70. As noted above, it has not been contended by [Ms A] that there are compelling circumstances that affect the interests of Australia in this case. The Tribunal therefore finds that PIC 4020(4)(a) is not met.
71. After considering all of the evidence before it the Tribunal is not satisfied that there are any circumstances in [Ms A]'s case that affect an Australian citizen, Australian permanent resident or eligible New Zealand citizen, either on an individual or cumulative basis, that are of a compelling or compassionate nature that they justify the waiver of PIC 4020 and the grant of a Subclass 820 visa to the applicant. While [Ms A] submitted the health of the sponsor was the circumstance warranting her being able to have the requirements waived the Tribunal was not satisfied on the evidence before it that was a circumstance to justify waiver. In making this finding the Tribunal accepts the applicant has some health issues but the Tribunal did not have before it any contemporaneous medical evidence that either his physical or mental health was such that he was in need of a carer.
72. Therefore the requirements of cl.4020(2) should not be waived.
73. On the basis of the above, [Ms A] does not satisfy PIC 4020 for the purposes of cl.820.226.

DECISION

74. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Moir Brophy
Member

ATTACHMENT

MIGRATION REGULATIONS 1994

SCHEDULE 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

MIGRATION ACT 1958

S.5 INTERPRETATION

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...